

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ISABELO R. SANCHEZ,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.
(CSA 3 147 711)

DOCKET NUMBER
SE08319010241

DATE: MAR 20 1991

Isabelo R. Sanchez, Angeles City, Philippines, pro se.

Bruce Hughes, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This appeal is before the Board upon the appellant's petition for review of the May 10, 1990 initial decision that sustained the reconsideration decision of the Office of Personnel Management (OPM) denying his application for a retirement annuity. For the reasons discussed below, we DENY the appellant's petition for review because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We REOPEN the appeal on our own motion, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still

sustaining OPM's reconsideration decision. See 5 C.F.R. § 1201.117.

BACKGROUND

The appellant, a resident of the Philippines, served with the Department of the Air Force from: (1) July 14, 1947, to April 22, 1950, when he was terminated; (2) April 23, 1950, to June 30, 1959, when he was separated in a reduction in force; and (3) May 29, 1962, to August 7, 1970, when he was mandatorily retired. He applied for a civil service retirement annuity on June 6, 1989, based on his service "from 1960 to 1968."¹ See Initial Appeal File (IAF), Tab 4, Subtab 5.

In its October 19, 1989, reconsideration decision, OPM advised the appellant that: (1) His service from April 22, 1950, to June 30, 1959, was covered service, but he had filed and OPM had granted an application for a refund of his deductions in the amount of \$772.18; (2) his "later

¹ The record includes an October 22, 1953, affidavit in which the appellant stated that he served in numerous appointments between November 12, 1927, and July 14, 1947, and a service history from the agency indicating that the appellant served in four appointments between May 14, 1945, and April 22, 1950, from which no retirement deductions were made. See Initial Appeal File (IAF), Tab 4, Subtab 5.

We note that, prior to the present application under review, between 1970 and 1988, the appellant applied for retirement benefits three times and once requested that he be allowed to redeposit his lump-sum payment, based on the same service under review here. The response, initially from the Civil Service Commission and then from OPM, to all of his applications was similar to that contained in the reconsideration decision presently under review. See IAF, Tab 3, Subtab 6.

service" ending on August 7, 1970,² was performed under appointments that were excluded from coverage under the Civil Service Retirement System (CSRS) and was therefore not creditable service; and (3) because the appellant was not employed with the Federal government at the time of his retirement application, and because he had received a lump-sum payment of his retirement deductions, he had voided his right to an annuity under 5 U.S.C. § 8342(a) based on his service from April 22, 1950, to June 30, 1959, and was not eligible to make a redeposit to the civil service retirement fund for that service under 5 U.S.C. § 8334(d). See IAF, Tab 4.

In his petition for appeal, the appellant conceded that he had applied for a \$772.18 refund of his retirement deductions, and that the refund had been authorized on September 16, 1959. He argued, however, that, when he was reemployed in a permanent position on August 5, 1962, the agency was obligated to require him to make deposits into the retirement fund. He asserted further that he was willing to make those deposits, but his employing agency did not inform him of the need to do so, and that it thus deprived him of an annuity. In addition, although he admitted that he is not presently employed with the Federal government, he apparently

² In its initial decision, OPM considered the appellant's service from August 5, 1962, to November 24, 1968. See IAF, Tab 4, Subtab 4. Our review of the record shows that, on May 29, 1962, the appellant received an excepted intermittent appointment not to exceed August 26, 1962, which was converted to an excepted indefinite appointment on August 5, 1962. The appellant's mandatory retirement was effective on August 7, 1970. See IAF, Tab 4, Subtab 6.

argued that, in the interests of equity, he was entitled to an annuity from which his \$772.18 refund would be deducted. Finally, he alleged that certificates that his employing agency issued to him in recognition of his 20 years of Federal service showed that OPM was incorrect in asserting that his service from August 5, 1962, to August 7, 1970, was not covered by the CSRS. See IAF, Tab 1.

In an initial decision based on the documentary record, the administrative judge found that the appellant received a refund of his retirement deductions for the period from April 22, 1950, to June 30, 1959, and that his service from August 5, 1962, to November 24, 1968, was paid from nonappropriated funds and therefore was not creditable service for Civil Service Retirement purposes, citing 5 C.F.R. § 831.305. See Initial Decision at 4-5. The administrative judge accordingly found that the appellant was not eligible for a retirement annuity, and she sustained OPM's reconsideration decision. See IAF, Tab 5.

The appellant has now petitioned for review of the initial decision.⁴ See Petition for Review File, Tab 1. OPM has not responded.

⁴ The Office of the Clerk returned the appellant's petition for review as deficient because the appellant failed to include a certificate of service indicating that he had served a copy of the petition on the opposing party and the designated representative. See Petition for Review File (PRF), Tabs 1, 2. The appellant then perfected his petition for review. See PFR, Tab 3.

ANALYSIS

In her initial decision, the administrative judge did not consider the appellant's argument on petition for appeal that, when he was reemployed in a permanent position in August of 1962, the agency was obligated to require him to make a redeposit into the retirement fund, and deprived him of an annuity because it did not inform him of a need to do so. See IAF, Tab 1. We note that the payment of a refund pursuant to 5 U.S.C. § 8342 voids all annuity rights unless the employee is subsequently reemployed in a covered position. See *Dorry v. Office of Personnel Management*, 35 M.S.P.R. 264, 269 (1987) (Levinson, Chairman, dissenting). While subsequently reemployed in a covered position, the employee must redeposit the amount received, with interest, in order to be allowed credit for his prior service. See 5 U.S.C. § 8334(d). When the appellant here was subsequently reemployed by the agency on August 5, 1962, he served under an indefinite appointment, which OPM has excluded from coverage under the CSRS. See 5 U.S.C. § 8347(g); *Castro v. Office of Personnel Management*, 5 M.S.P.R. 326, 327 (1981); IAF, Tab 4, Subtab 6. Because the appellant was therefore ineligible to redeposit his refund upon reemployment, the agency cannot have been obligated to either require or inform the appellant to redeposit his \$772.18 refund for credit.

The administrative judge also failed to consider the appellant's argument that he was entitled to an annuity

reduced by \$772.18, based on equitable principles. See IAF, Tab 1. However, given the appellant's ineligibility for an annuity under 5 U.S.C. § 8342, he cannot now be awarded an annuity based on equitable principles alone. See, e.g., *Shelley v. Office of Personnel Management*, 6 M.S.P.R. 267, 272 (1981) (a statutorily imposed requirement for eligibility is substantive rather than procedural and allows for no exercise of discretion on the part of OPM).

The administrative judge further failed to consider the appellant's argument that his service from August 5, 1962, to August 7, 1970, should have been considered covered service because he was a Federal employee, which he supported with certificates issued in recognition of his 20 years of Federal service. However, the certificates, which were awarded to the appellant on his retirement from civilian service, do not stand as evidence that his service from August 5, 1962, to August 7, 1970, was covered service. See IAF, Tab 1.

The appellant's arguments on petition for appeal thus do not establish his entitlement to an annuity. See *Hollowell v. Office of Personnel Management*, 30 M.S.P.R. 465, 468 (1986) (the burden is on the appellant to establish his entitlement to an annuity by a preponderance of the evidence). We therefore conclude that the administrative judge's failure to consider those arguments does not warrant reversal of the initial decision. See *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not

prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

We note, in addition, that the administrative judge failed to mention OPM's error in concluding that the appellant's later service was excluded from coverage under the CSRS, and was therefore not creditable service. See IAF, Tab 4, Subtab 2. In *Noveloso v. Office of Personnel Management*, 45 M.S.P.R. 321, 323-24 (1990), the Board addressed the distinction between creditable service and covered service. We held that, although almost all Federal service was creditable, only service that was "subject to" the Civil Service Retirement Act was covered. *Id.* at 323-24. We also held that all Federal service was covered by the CSRA, except for service specifically excluded by law or by OPM regulation. *Id.*, slip op. at 3, citing Federal Personnel Manual Supp. 831-1, subch. S2-1 (Sept. 21, 1981). However, we find that the administrative judge's oversight does not constitute reversible error here either because, although the appellant's service from August 5, 1962, to August 7, 1970, was creditable service, it was not covered service for purposes of entitlement to an annuity. See *Panter*, 22 M.S.P.R. at 282.

Finally, we note that the administrative judge did not address an October 22, 1953 affidavit, included with the appellant's petition for appeal, in which he stated that he served in numerous appointments between November 12, 1927, and July 14, 1947. See IAF, Tab 1. Again, the omission does not constitute prejudicial error to the appellant's substantive

rights. The affidavit is irrelevant to this appeal because the appellant based his June 6, 1989 application to OPM on his service "from 1960 to 1968," and he did not argue on petition for appeal that he was entitled to an annuity based on his alleged service between November 12, 1927, and July 14, 1947. See IAF, Tab 4, Subtab 5. Moreover, there is no record evidence supporting the assertions made in the affidavit; rather, the agency's records indicate the appellant's service began on July 14, 1947.⁴ Accordingly, we find that the administrative judge's failure to address the affidavit does not warrant reversal of the initial decision. See *Panter*, 22 M.S.P.R. at 282. See also *Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141 (1986).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113.

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final

⁴ The record shows that the appellant filed an October 22, 1953 service credit application based on five alleged appointments occurring between May 14, 1945 and April 22, 1950. The appellant indicated that no deductions were withheld from his pay in these appointments. See IAF, Tab 4, Subtab 6. In a December 15, 1953 response to the application, the Civil Service Commission informed the appellant that it had no record of those appointments. See IAF, Tab 4, Subtab 5.

decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.